A

SULFEE ALIAS

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL APPEAL NO. 42-14-2004-II]
9 MAY 2006

C ***CRIMINAL PROCEDURE:*** *Charge - Defective charge - Allegation of - Failure to itemise which part of charge bad in law - Criminal Procedure Code, s. 307(6) - Whether complied with - Whether charge lacked requisite mens rea - Whether trial judge erred in findings - Whether appellant prejudiced*

D ***EVIDENCE:*** *Proof - Burden of - Witnesses - Assessment of witnesses - Whether trial judge misdirected - Whether trial judge in best capacity to judge witnesses' credibility - Whether prima facie case had been made*

EVIDENCE: *Hearsay - Admittance of - Whether evidence of witnesses*
E *hearsay - Whether qualified as direct evidence pursuant to s. 60(1)(b) Evidence Act 1950 - Adverse inference - Whether drawn against prosecution - Whether there was withholding or suppression of evidence by prosecution*

F ***CRIMINAL LAW:*** *Anti Corruption Act 1997 - Section 11 (c) - Intention to deceive - Whether there was sufficient credible evidence - Whether appellant had required mens rea to complete charge against him - Whether due weight given to defence - Whether there was irregularity in proceeding - Whether trial judge erred*

G ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against - Circumstances - Grave nature of offence - Public interest - Consideration of - Whether court inclined to interfere with sentence imposed - Whether sentence affirmed*

H The appellant herein was convicted by the Sessions Court Judge and sentenced to one year imprisonment and a fine of RM25,000 or in default six months' imprisonment in respect of an offence under s. 11(c) of the Anti Corruption Act 1997 ('the Act'). The appellant was an administrative assistant with SMK Bako (the
I school) and was therefore an agent of the government of Malaysia. On 18 December 2000, at the Jabatan Akauntan Negara's office (JAN), he had certified on Paramount Enterprise's invoice (the said

invoice) that the said company had supplied the 20 rolls of linoleum floor mat (the floor mats) when the same had not been supplied and had done so with knowledge of the falsity of the said certification and with the intention to deceive the government. The appellant, in appealing against conviction and sentence, contended that (a) the trial judge had erred in law and in fact when she failed to rule that the charge preferred against the appellant was incomplete, defective and bad in law; (b) the trial judge had misdirected herself on the issue of burden of proof in assessing the evidence of the prosecution's witnesses; (c) the trial judge concluded that a *prima facie* case was made out by the prosecution which was riddled with infirmities, uncertainties and material contradiction which gave rise to gaps in the prosecution's case; (d) that the trial judge had wrongly allowed evidence of conversations between PW2 and PW11 to be admitted when such evidence was hearsay; (e) the trial judge wrongly admitted exh. P18 as evidence; (f) the trial judge erred in law and in fact when she made findings that the appellant had the intention to deceive his principal from his conduct; (g) the trial judge made a wrong finding on the cheque exh. P8 by commenting on the giving of the cheque to the appellant by PW2 as giving rise to sufficient credible evidence against the appellant when there was no evidence to show that the appellant cashed the cheque; (h) the trial judge erred in law in her application of s. 73 Evidence Act 1950 in comparing the appellant's signature in exh. P7 and exh. P15; (i) that since the respondent was relying on s. 73 of the Evidence Act 1950 the same provision applied as far as PW11's signature on LPO No. 713280; (j) the trial judge had misdirected herself on the appellant's defence which was an unsworn statement from the dock and (k) that there was irregularity in the trial in calling PW11. The issues that arose were (i) whether there were merits in the grounds of appeal submitted and (ii) whether this court should interfere with the sentence imposed by trial judge.

Held (affirming finding of guilt, conviction and sentence):

(1) The appellant did not itemise which part of the charge was incomplete, defective and bad in law; and also failed to itemise which part of the evidence that was uncertain and contained material contradictions when the trial judge had misdirected herself in assessing prosecution's witnesses. The appellant did not comply with the mandatory provision of

A s. 307(6) of the Criminal Procedure Code. As to the appellant's submission that the charge against him lacked the requisite *mens rea* to make the act complained of a criminal offence, in the instant case, the requisite *mens rea* was indicated by the word 'knowingly uses with intent to deceive' B and 'which to his knowledge is intended to mislead.' The trial judge had noted the need for this requisite *mens rea*. Therefore, the trial judge did not err in her findings as to the necessary ingredients to be proved in respect of the charge preferred against the appellant under s. 11(c) of the Act and C no prejudice has been caused to the appellant whatsoever. (paras 4, 5 & 6)

(2) There was no misdirection by the trial judge on the issue of proof as alleged by the appellant. The trial judge had D identified the necessary ingredients which the prosecution must prove beyond reasonable doubt in order to sustain the conviction against the accused. The trial judge had also considered the evidence of the relevant witnesses in respect of each ingredient to be proved by the prosecution. The trial E judge had assessed the demeanour of two key witnesses PW2 and PW11. Unless it could be shown that the trial judge had erred in her findings, this court was in no position to disturb these findings as the trial judge had seen these said witnesses herself and would be in the best capacity to F judge their credibility. (para 7)

(3) Upon a perusal of the grounds of judgment and notes of proceedings, the trial judge had considered the necessary ingredients to be proved and the evidence of the relevant witnesses and came to the correct conclusion that a *prima* G *facie* case had been made out by the prosecution upon a maximum evaluation of the evidence. The appellant's contention on this ground could not be sustained.

(4) The trial judge was correct in admitting the evidence of PW2 H and PW11 as these two witnesses had heard what the appellant said to them and it qualified as direct evidence pursuant to s. 60(1)(b) of the Evidence Act 1950. Further, since one Abg Othman and one Gat Belabot were offered by the prosecution to the defence, there was therefore no I withholding or suppression of evidence by the prosecution. No adverse inference should be drawn against the prosecution in not calling them as witnesses. (paras 8 & 9)

(5) The trial judge had remained true to her stand by merely treating exh. P18 as a letter of complaint lodged by PW11 to the education department. Therefore, the appellant's contention that the trial judge had wrongly admitted exh. P18 as evidence was without basis. (para 11)

(6) The trial judge was correct in determining whether the appellant had the intention to deceive or to mislead his principal by looking into the conduct of the appellant in issuing the LPO (exh. P6). (para 12)

(7) There was sufficient credible evidence to infer that the appellant had required *mens rea* to complete the charge against him. Evidence showed that behind the cheque exh. P8, there was an identity card number No: 721026-13-5019 and the signature of a person who cashed the cheque. Further, on the reverse side of the cheque not only the said identity card number appeared but there was another no. K0349510 which appeared beneath the first number and the date which logically denotes the date 15 December 2000, which was the date PW2 handed the said cheque to the appellant. The aforesaid two numbers tallied with the IC number of the appellant. This gave rise to the irresistible inference that it was the appellant who cashed the said cheque. (para 15)

(8) The appellant had not challenged PW11's evidence that he had acknowledged receipt of the 14 rolls of floor mat ordered by PW11 from Morazi Enterprise and therefore, the trial judge did not err in comparing the appellant's signature in exh. P7 and exh. P15. (para 17)

(9) According to the evidence of PW11, the LPO were in four copies. None of her signature was on the green coloured LPO and she became suspicious because normally when she signed on the LPO there would be a carbon copy between the pages of the LPO and her signature would reach the green coloured copy of the LPO. PW11 had positively said that she did not sign on the LPO exh. 6 because she had not asked the appellant to order the four items stated in the LOP exh. 6. It was patently clear that the green copy of the LPO exh. P6 was without the signature of PW11. (para 18)

(10) In considering the defence, the trial judge was mindful of the fact that a statement from dock carried less weight than one which was given under an oath. The trial judge herein had given the defence its due weight in light of her findings and conclusions. Also, there was no irregularity in the proceeding of the trial and furthermore, the prosecution re-examined PW11 on areas that were raised during cross examination. (paras 19 & 20)

(11) There was no merit in the grounds of appeal submitted by the appellant in support of his appeal against conviction and therefore, this court affirmed the finding of guilt and conviction entered by the trial judge. (para 21)

(12) Considering all the aforesaid matters against the backdrop of the case, the circumstances under which the offence was committed and the grave nature of the offence of which public interest was of foremost consideration, this court was not inclined to interfere with the sentence imposed by the trial judge and hence, this court affirmed the sentence of one year imprisonment and the fine of RM25,000 in default six months imprisonment.

Case(s) referred to:

Abdul Rahim Hassan v. PP [1997] 4 CLJ Supp 381 HC ***(refd)***
Goh Leng Sai v. Reg [1959] 25 MLJ 121 ***(refd)***
Hashim v. PP [1967] 1 MLJ 251 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Uthayakumar Ponnusamy v. PP [2003] 2 CLJ 549 HC ***(refd)***
Yan Wing Lee v. PP [1994] 2 CLJ 453 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Salim Hamiddulraham [1998] 4 CLJ 199 HC ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***

Legislation referred to:

Anti-Corruption Act 1997, ss. 11(c), 16, 19
Criminal Procedure Code, ss. 294, 307(6)
Evidence Act 1950, ss. 60(1)(b), 73, 114(g)
Prevention of Corruption 1961, s. 4(c)

Other source(s) referred to:

Augustine Paul, *Evidence Practice and Procedure*, 3rd edn, p 548
Low Hop Bing, *Principles of Sentencing as Applied to Offences Relating to Bribery and Corruption*, [1976] MLJ xcvii

For the appellant - Mohd Ivan Hussein; M/s Ivan Hussein
For the respondent - Asliza Ali DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

[1] The appellant, Sulfee bin Alias, was convicted by the learned Sessions Court Judge on 28 September 2004 and sentenced to 1 (one) year imprisonment and a fine RM25,000 or in default 6 (six) months imprisonment in respect of an offence under s. 11(c) of the Anti-Corruption Act 1997 (Act 575) ("the Act"). The appellant is appealing against conviction and sentence in respect of the following charge:

> Bahawa kamu pada 18hb Disember 2000, di Pejabat Jabatan Akauntan Negara Cawangan Sarawak, sebagai seorang Agen Kerajaan Malaysia, iaitu Pembantu Tadbir, Sekolah Menengah Kebangsaan Bako, Jalan Bako, Kuching, dengan disedari oleh kamu, kamu telah menggunakan satu dokumen iaitu invoice Paramount Enterprise no. 156430A bertarikh 8.12.2000, yang berkenaan dengannya principal kamu mempunyai kepentingan, di mana dokumen tersebut mengandungi butiran matan yang palsu, iaitu, kamu telah mengesahkan bahawa Paramount Enterprise telah membekalkan dengan sempurna tikar getah linoleum sebanyak 20 gulung bernilai RM5,000.00 ke Sekolah Menengah Kebangsaan Bako, Jalan Bako, Kuching, di mana dalam keadaan sebenarnya bekalan tersebut tidak dibekalkan, dan dengan itu, kamu telah melakukan kesalahan di bawah Seksyen 11(c) Akta Pencegahan Rasuah 1997 dan boleh dihukum di bawah Seksyen 16 Akta yang sama (Undang-Undang Malaysia Akta 575).

[2] In the petition of appeal in respect of the issue of conviction, the appellant has stated 11 grounds (Ground 3A to Ground 3K); and in respect of the issue of sentence, the appellant has stated 3 grounds (Ground 4A to Ground 4C). Upon query by the court as to whether he was proceeding on all the grounds, learned counsel for the appellant, Mr. Mohd. Ivan Hussein stated that the main thrust of his submission is focused on 2 areas:

A (i) Grounds 3B, C, D, E, H and I of the petition of appeal is centred on the issue of whether there was non-delivery of the 20 rolls of linoleum floor covering costing RM5,000 to render false the particulars in Paramount Enterprise's invoice No. 156430A ("the said invoice");

B (ii) Grounds 3A, F, G, J, K and L of the petition of appeal of whether the appellant's statement from the dock answered the charge sufficiently to dislodge the standard of proof required of the prosecution.

C **[3]** Notwithstanding the manner the learned counsel for the appellant has submitted, I shall deal with the appeal in accordance with the order of the grounds as stated in paras 3 and 4 of the petition of appeal wherever possible. The appellant's contention is as follows:

D (i) in respect of Ground 3A (first ground), the learned trial judge had erred in law and in fact when she failed to rule that the charge preferred against the appellant was incomplete, defective and bad in law, in view of, particularly but not E limited to, her findings as to the ingredients of the offence with which the appellant was charged;

(ii) in respect of Ground 3B (second ground), the learned trial judge misdirected herself on the issue of burden of proof in F assessing the evidence of prosecution's witnesses whereby the learned trial judge delved into the credibility and veracity of such evidence in a manner suggesting that such evidence was true "or beyond reproach" unless proven otherwise by the defence; and

G (iii) in respect of Ground 3C (third ground), the learned trial judge concluded that a *prima facie* case made out by the prosecution was riddled with infirmities, uncertainties and material contradictions/discrepancies which gave rise to gaps in the prosecution's case.

H **[4]** Learned DPP, Cik Asliza bte. Ali for the respondent submitted that the three grounds are too general as the appellant did not itemise which part of the charge was incomplete, defective and bad in law; and also failed to itemise which part of the I evidence that was uncertain and contained material contradictions when the learned trial judge has misdirected herself in assessing

prosecution's witnesses. The case of *Yan Wing Lee v. PP* [1994] 2 CLJ 453 was cited where Dato' Haji Abdul Malik bin Haji Ishak JC (as he then was) at p. 457 c to d left:

> ... the legal situation appears to be that the appellant must abide by the petition of appeal and the learned Counsel for the appellant, in all fairness to the learned deputy public prosecutor, should submit solely on the points of law or fact as set out in the petition of appeal and should not dabble on points of law or fact not set out in the petition of appeal. In my judgment, s. 307(vi) of the Criminal Procedure Code (F.M.S. Cap 6) is couched mandatorily and any failure to observe it would be fatal. In the circumstances, this Court is entitled to disregard the grounds that were not itemised in the petition of appeal.

Section 307(6) of the CPC states:

> Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred.

I am in agreement with the learned DPP that the appellant did not comply with the mandatory provision of s. 307(6) and I am entitled to disregard the three grounds.

[5] However, in the event I have erred, I now consider them. In respect of Ground 3A, the appellant submitted that the charge against him lacked the requisite *mens rea* to make the act complained of a criminal offence, "otherwise it would simply be that as long as the appellant had committed the '*actus reus*' under s. 11(c) of (the Act) for whatever reason, be it carelessness, neglect or recklessness, that in itself would suffice for a finding of guilt" and referred to the case of *Uthayakumar Ponnusamy v. PP* [2003] 2 CLJ 549 at p. 559 f up to p. 560 f and p. 561 d to e. In *Uthayakumar*'s case, the learned judge held, *inter alia*, that there was a failure to insert the *mens rea* ingredient ("with intent") in respect of the charge under s. 506 of the Penal Code and the charge was therefore badly drafted; factually incorrect and the prevailing uncertainty particularly the part of not knowing which limb the applicant was charged for could mislead the applicant in the preparation of the case and is prejudicial to his interest.

[6] In this instant case, the charge is one under s. 11(c) of the Act and I am of the view that the requisite *mens rea* is indicated by the word "knowingly uses with intent to deceive" and "which to his knowledge is intended to mislead". I do agree that the charge which is in Bahasa Malaysia has failed to include the words "which to your knowledge was intended to mislead the principal" before the words "dan dengan itu, kamu telah melakukan kesalahan di bawah seksyen 11(c) Akta Pencegahan Rasuah 1997 dan boleh dihukum di bawah seksyen 16 Akta yang sama (Undang-Undang Malaysia Akta 575)". Notwithstanding the absence of the words "which to your knowledge was intended to mislead the principal"' in the charge, I find that the learned trial judge had noted the need for this requisite *mens rea* at p. 68 of the record of appeal when she identified that it is necessary for the prosecution to prove that the accused "did (certify the said invoice) with knowledge of the falsity of the said certification and with the intention to deceive the Government of Malaysia." (for proof of the ingredients of the charge under s. 11(c) of the Act which is in *pari materia* with s. 4(c) of the Prevention of Corruption 1961 (Act 57), see *Abdul Rahim Hassan & Anor v. PP* [1997] 4 CLJ Supp 381 at p. 393 a to c). Therefore, I find that the learned trial judge did not err in her findings as to the necessary ingredients to be proved in respect of the charge preferred against the appellant under s. 11(c) of the Act and no prejudice has been caused to the appellant whatsoever.

[7] In respect of Ground 3B (second ground), I am of the view that there is no misdirection by the learned trial judge on the issue of proof as alleged by the appellant. The learned trial judge had identified the necessary ingredients which the prosecution must prove beyond reasonable doubt in order to sustain the conviction against the accused as follows:

(1) That the accused was an Administrative Assistant with SMK Bako (the school for short) and was therefore an agent of the Government of Malaysia; ('the technical issue')

(2) That on the 18th December, 2000 at the Jabatan Akauntan Negara's Office (JAN for short) he had certified on Paramount Enterprise's invoice no. 156430A (the said invoice for short) dated 8/12/00) that the said company had supplied the 20 rolls of linoleum floor mat (the floor mats for short) when the same had not been supplied; ('the *actus reus*')

(3) He did that with knowledge of the falsity of the said certification and with the intention to deceive the Government of Malaysia.

Mens rea, in the form of the accused's knowledge and intention is thus an essential element of the charge. ('the *mens rea*').

Having done that, the learned trial judge had considered the evidence of the relevant witnesses in respect of each ingredient to be proved by the prosecution as contained in pp. 68 to 77 of the record of appeal. The learned trial judge had assessed the demeanour of two key witnesses PW2 (Madam Goh Ah Guek) and PW11 (Puan Hamsiah binti Sa'ee) at p. 77 of the record of appeal and came to the conclusion that PW2 was not an accomplice and PW11 was a person of integrity and honest in her answers based on the findings she had made at p. 77 lines 4 to 27. Unless it can be shown that the learned trial judge had erred in her findings, I am in no position to disturb these findings as the learned trial judge had seen these two witnesses herself and would be in the best capacity to judge their credibility.

In relation to Ground 3C (third ground), the learned counsel for the appellant had submitted that the testimony of PW2 that Paramount Enterprise had fulfilled the order in respect of exh. P7 was contradictory and he referred to the following evidence:

(i) In examination-in-chief:

The accused agreed the Parablok would be sent later as we had no stock. To me I completed the order as in ID. Our company did not deliver the 20 rolls of tikar getah. (Record of Appeal, page 7 lines 5-7).

(ii) In cross-examination:

Put: When ID10 was given to you, both the Parablok and tikar getah had not been delivered by your company to SMK Bako.

A: I received the cheque on the 9/1/01. I cannot remember if the Parablok and tikar getah had been delivered. (Record of Appeal, page 12 lines 20-23).

(iii) In re-examination:

The Principal of the school contacted us by phone about the tikar getah.

> She asked where were the 20 rolls of tikar getah and I said the accused was supposed to send them to the school. She asked us to look for him because he was not in the school. The Principal gave the accused's phone number but we didn't meet him. Roziwati brought me to his house. The accused said the tikar getah were in the school and that he will go to the school to check. I told the principal that the accused would go back to the school to check. After that the school never rang me up. (Record of Appeal page 16, lines 27 to 32 up to page 17, lines 1-2).

The learned counsel for the appellant submitted that PW2 said that Parablok was delivered in January 2001 whereas the Duplo Ink and Duplo Master were delivered around November 2000; PW3 said that she was told the Duplo Ink and Duplo Master were sent; PW4 said that she delivered the Parablok, Duplo Ink and Duplo Master (record of appeal, p. 13 line 6; p. 18 line 17 and p. 20 line 1; p. 21 line 17). I am of the view that these are minor discrepancies because what is material to this case is the issue of whether the 20 rolls of linoleum floor covering (floor mat) had been delivered to the SMK Bako. In fact, this is what has been noted by the learned trial judge when she stated that the bone of contention was on receipt of the floor mat (record of appeal, p. 69 lines 14-15). The totality of the evidence adduced by the prosecution through PW2, PW4 and PW11 is that the 20 rolls of linoleum floor covering had not been received by the school as was found by the learned trial judge in her assessment of the evidence at record of appeal pp. 70-77.

Apart from what I have observed, in respect of Ground 3C (third ground), I am of the view that the contention of the appellant cannot be sustained because upon a perusal of the grounds of judgment and the notes of proceedings, I find that the learned trial judge has considered the necessary ingredients to be proved and the evidence of the relevant witnesses and came to the correct conclusion that a *prima facie* case had been made out by the prosecution upon a maximum evaluation of the evidence. I will deal with this in greater detail in my treatment of the other grounds.

[8] In respect of Ground 3D (fourth ground), the appellant contended that the learned trial judge wrongly allowed evidence of conversations between PW2 and PW11 to be admitted when such evidence was hearsay and in the nature of confession that tended

to incriminate the appellant. The evidence of PW2 and PW11 appear at pp. 4 to 17 and pp. 32 to 38 and 40-52 (on recall of PW11) of the record of appeal respectively. The learned trial judge had given her reasons that she disagreed with the contention of the appellant counsel that the said conversation was hearsay as "the two witnesses heard them straight from the horses' mouth, so to speak and was therefore credible evidence to show proof that the floor mats were not delivered when considered with evidence of the other witnesses, I do not think it is necessary for the prosecution to prove that the school stores had been checked to see if the floor mat were in fact there in view of the combined evidence from the aforesaid witnesses and the clear and explicit evidence of the accused own words and conduct from PW2's and P11's testimonies". I agree with the submission of the learned DPP that the learned trial judge was right in admitting the evidence of PW2 and PW11 as these two witnesses heard what the appellant said to them and it qualifies as direct evidence pursuant to s. 60(1)(b) of the Evidence Act 1950. Section 60(1)(b) states:

> Oral evidence shall in all cases whatever be direct, that is to say:
>
> (a) ...
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; ...

In *Evidence Practice and Procedure,* 3rd edition by Augustine Paul at p. 548, it is stated:

> This section states that in oral evidence in all cases be direct. It relates to the rule against hearsay.
>
> Per Murray-Aynsley CJ in *Lim Ah Oh & Anor v. R* [1950] MLJ 269, 270 (CA):
>
> > The rule against hearsay is found in section 60 of the Evidence Ordinance. On this matter I think that the rule is the same as in England and that under that section evidence of statements might be admitted provided always that the reason of admitting was borne in mind, and carefully explained to the jury, if there was one.

The appellant argued that an adverse inference must be drawn against the prosecution's failure to call 1 or more of the 2 others alleged to have been present at the meeting on 31 October 2001 with PW11 as this could likely mean that such a meeting did not

take place or the appellant did not say what was alleged by PW11. I agree with the learned DPP that the prosecution need not call the two witnesses, En. Abg. Othman bin Abg. Masagus and En. Gat ak Belabot, two senior assistants identified by PW11 as being with her on 31 October 2001 when she called the appellant to her room for a meeting as it would serve no purpose because their evidence would centre on the alleged written document made by the appellant, (ID17) which has been ruled by the learned trial judge to be inadmissible.

[9] Further, in *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 Augustine Paul J (now Federal Court Judge) opined that the scope of s. 114(g) of the Evidence Act was considered by the (then) Supreme Court in *Munusamy v. PP* [1987] 1 MLJ 492 where Mohamed Azmi SCJ (as he then was) said at p. 494:

> It is essential to appreciate the scope of section I14(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn *if there is withholding or suppression of evidence* and *not merely on account of failure to obtain evidence.* It may be drawn from *withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.* (emphasis added)

Since both these witnesses, En. Abg. Othman bin Abg. Masagus and En. Gat ak Belabot have been offered by the prosecution to the defence, there is therefore no withholding or suppression of evidence by the prosecution and I am of the view that no adverse inference should be drawn against the prosecution in not calling them as witnesses.

[10] The other contention is that the learned trial judge had erred in allowing such evidence since it was in the nature of a confession. This ground is tied with Ground 3I (ninth ground) where the appellant alleged that the inclusion of ID17 which is in the nature of a confession by the appellant gives rise to the irresistible inference that the learned trial judge directed her mind to this exhibit in arriving at a conviction. Although at p. 3 of the index to the record of appeal, ID17 is stated as exh. 17, which to my mind is a typographical error, it is patently clear that the said document is marked as ID17 at p. 177 of the record of appeal. The learned trial judge has correctly not admitted it as evidence for the following reason:

> ID17 was a document purportedly prepared and signed by the accused detailing the goods which was ordered and not sent. The prosecution sought to tender all these documents through the IO of the case (PW13). The defence objected. I overruled that objection except for ID17 because in essence ID17 was a confession not only of the subject matter of this case but of others as well and I was of the view that the prejudicial effect of that document far outweighs its probative value.

[11] With regard to Ground 3E (fifth ground), the appellant contended the learned trial judge wrongly admitted exh. P18 as evidence. A perusal of the grounds of judgment and the notes of proceeding showed that the learned trial judge had remained true to her stand by merely treating it as a letter of complaint dated 6 February 2001 lodged by PW11 to the Education Department. Therefore the contention of the appellant is without basis.

[12] In respect of Ground 3F (sixth ground), the appellant submitted that the learned trial judge erred in law and in fact when she made findings that the appellant had the intention to deceive his principal from his conduct. The relevant portion of the grounds of judgment is at p. 76 line 15 of the record of appeal:

> Has the prosecution proved that the required *mens rea* ie the accused with full knowledge that P7 contained false certification about the receipt of the floor mat intended to use it to deceive his principal ... the intention to deceive ... can be deduced from the conduct of the accused in issue the LPO P6 without the prior knowledge and authorization of PW11 and then going to see PW2 with that improper arrangement of obtaining payment for the mat from PW2 and buying them from another supplier. Yet PW11 was able to verify that the floor mats were never sent to the school and in fact there was a purchase of the same item by her made about 2 weeks earlier.

In *Hashim v. PP* [1967] 1 MLJ 251, a case involving an offence under s. 4(c) of the Prevention of Corruption Act 1961 (which is in *pari materia* with s. 11(c) of the Act), one of the issues on appeal was the failure of the prosecution to prove that the intent was false to the knowledge of the appellant. It was held that "knowledge like intention is a question of fact which generally may be inferred from circumstances of the case: ..." Therefore, I am of the view that the learned trial judge was correct in determining whether the appellant had the intention to deceive or to mislead his principal by looking into the conduct of the appellant in issuing the LPO (exh. P6) as mentioned in the passage quoted above.

[13] In relation to Ground 3G (seventh ground), the appellant contended that the learned trial judge made a wrong finding on the cheque, exh. P8, by commenting on the giving of the cheque to the appellant by PW2 as giving rise to sufficient credible evidence against the appellant to infer the appellant had the requisite *mens rea* when there is no evidence to show that the appellant cashed the cheque; and failed to direct her mind to s. 73 of the Evidence Act 1950 in examining the signature on exh. P8. The relevant portions of the judgment of the learned trial judge is as follows:

> She said that the accused came to see her on 15th December 2000 telling her that payment voucher for ExP7 had been prepared and that he had sent the voucher to JAN for payment. Given that she could not supply the floor mat in that short period of time she said the accused asked her to give him the payment for the floor mat so that he could purchase them from another supplier. He even told her that they have chosen the pattern for the floor mat. PW2 said that she was therefore left with no choice and issued him a cash cheque from Standard Chartered Bank for RM4205 (ExP8). The cash cheque was issued for amount although P7 stated the cost of the floor mat as RM5000 because she said they have deducted their profit from the said sum. (Record of Appeal, page 73 line 25-32; page 74 lines 1-3).
>
> Although I concur with the defence that there was no evidence to show that the accused was the one who had cashed the cash cheque given by PW2 to him, the fact that a cash cheque was issued to him in the aforesaid circumstances, there arose sufficient credible evidence again to infer that he had the required *mens rea* to complete the ingredients of the charge against him. If he did not have the requisite *mens rea*, then why was the floor mat not purchased with the money reimbursed by PW2 and sent to the school? (Record of Appeal, page 76 lines 26-31; page 77 lines 1-3).

[14] In respect of this point, I rely on the case of *Abdul Rahim Hassan v. PP* [1997] 4 CLJ Supp 381 cited by the learned DPP where at p. 398, the learned judge had stated:

> The law is settled that there is no necessity for the prosecution to prove that the person accused of an offence under s. 4(c) received or enjoyed any kind of monetary benefit. In *Nadimuthu v. Public Prosecutor*, cited earlier, Ong Hock Sim FJ referred to the case of *Sage v. Eicholz* [1919] 2 KB 171, a case under the U.K. Prevention of Corruption Act 1906 which is almost identical to our Act. With regard to the equivalent of our s. 4(c) of the Act, Bray J said:

> Then the third paragraph in the statement of the offence created by it contains no reference to corruption. The word 'corruptly' which is used in the first two paragraphs is deliberately omitted from the third ... The word 'knowingly' is deliberately used in that paragraph instead of the word 'corruptly' and 'knowingly' does not necessarily involve any element of corruption. The substitution of the word 'knowingly' was probably made because of the great difficulty of proving corruption, and it was thought advisable in a case of the kind dealt with in that paragraph to make the act an offence whether it was done corruptly or not.

[15] Regarding exh. P8, I agree with the learned counsel for the appellant that the reverse side of the said cheque has not been photostated. Nevertheless, I have called for the original exhibit so that I could view it personally. The learned trial judge said that she concurred with the defence that there was no evidence to show that it was the appellant who cashed the cash cheque given by PW2 to him but however she said that there was sufficient credible evidence to infer that he had the required *mens rea* to complete the ingredient of the charge against him. At this juncture I wish to point out that there is the evidence of PW8 (Puan Rosiyah ak Parnell) who testified that behind the cheque exh. P8 (Standard Chartered Bank Cash Cheque No. 502410 for the amount of RM4,205 dated 15 December 2000 issued by PW2 to the appellant on 15 December 2000) there is the identity card No. 721026-13-5019 and the signature of the person who cashed the cheque. It is true that PW8 said that she did not process the cheque and she did not know the person who cashed it and neither did she see the person who cashed it. However, if one looks at the reverse side of the cheque not only the identity card No. 721026-13-5019 appears but there is another No. K0349510 which appeared beneath the first number and the date beneath the words "amount entered" is "12/15 12:54:47" which logically denotes the date 15 December 2000, which is the date PW2 handed the said cheque to the appellant. The aforesaid two numbers tallied with the I.C. No. of the appellant. This to my mind gives rise to the irresistible inference that it was the appellant who cashed the said cheque as was submitted by the prosecuting officer at p. 99 of the record of appeal (para 7) and indeed I find the learned trial judge had asked a relevant question when she said, "If he (appellant) did not have the requisite *mens rea*, then why was the floor mat not purchased with the money reimbursed by PW2 and sent to the school?"

[16] Ground 3H (eighth ground) is tied to Ground 3G (seventh ground). In respect of Ground 3H, the appellant contended that the trial judge erred in law in her application of s. 73 of the Evidence Act in comparing the appellant's signature in exh. P7 and exh. P15. The relevant parts of the learned trial judge's grounds of judgment is as follows:

> PW3 testified ... that the accused signed on this document at the column 'received by' and that after she signed it she gave it to PW4 to send to the school ... when she signed on P7 it was not signed by the accused yet ... other than her evidence there was no other evidence pertaining to the accused certification on the invoice but I am of the view that the prosecution case was not handicapped by the absence of such evidence ... My reasons for saying so ... firstly section 73 ... gives me power to compare the accused signature with the one which had already been admitted or proved in court. (Record of Appeal page 74 lines 19-31).
>
> In this respect, I would refer to Ex P15 the LPO dated 30 November 2000 No. 713284 for 14 rolls of floor mat ordered by PW11 from Morazi Enterprise which she said was acknowledged receipt by the accused. This fact and document was not disputed or challenged by the defence. Thus by virtue of section 73 I am entitled to compare his signature in that document with that of P7 and the similarity of the signatures which appears on these two documents convinced me that the accused did append his signature on ExP7. (Record of Appeal, page 75 line 1-8).
>
> In the year 2000 we did order tikar getah from Morazi Enterprise. I dealt with that purchase. In that year we never ordered from other suppliers for tikar getah ... I made the order in 11/11/00. I ordered 14 rolls of tikar getah ... Upon delivery the 14 rolls of tikar getah were handled by the accused. (Record of Appeal, page 35 lines 26-31).
>
> PW11 shown and identified LPO addressed to Morazi Enterprise for 14 rolls of tikar getah ... My signature of the Pengetua is mine ... followed by Morazi Enterprise ... the last is that of the accused ... the goods were sent before the 30/11/00 ... the content of LPO was filled by the accused ... the accused received the 14 rolls of tikar getah on the 30/11/00 ... Tender LPO as exhibit ... No objection ... ExP15. (Record of Appeal, page 36 lines 7-21).

At p. 75 line 4, the learned trial judge stated that "this fact and document was not disputed by or challenged by the defence" ie, the fact that appellant acknowledged receipt of exh. P15 and exh. P15 itself was not disputed or challenged by the defence.

With due respect to the learned trial judge, I find that this statement is not wholly accurate in relation to the aspect of the latter finding. This is because PW11 was cross-examined in respect of exh. P15 as follows:

Q: Would it be irregular if orders made to Morazi be paid by allocation for food[?]

A: Yes. (Record of Appeal, page 45 lines 7-9).

Refer to ExP15.

This LPO was under Peralatan Asrama. I could not remember the number.

I am not sure if the head for the item ordered should be written under the item 'Perakuan' after the words 'di simpan dan dibukukan dalam lejar section folio No. ... (Record of Appeal, page 45, lines 17-22).

Put: The LPO ExP15 was paid for out of allocation for food.

A: I can't remember.

All I remember that I asked the accused what the amount left under Peralatan Asrama. He gave me a figure I can't remember. After discussing with my Warden we agreed to buy Linoleum with that money.

(Record of Appeal, page 45 line 6 to page 46 line 5).

Put: Your disassociation with ID6 was for the simple reason you made an order for Morazi at a higher price.

A: No.

I disagree that the linoleum ordered in ExP15 was not delivered in SMK Bako and that something else was substituted for it.

Refer to ExP15.

Yes I obtained the quote from Morazi. I attended personally to this order because it had to be done fast since it was almost holiday time and almost closing of account.

Yes, when the order was placed it was already school holiday. The closing of account for our school was the 10/1/01 but for things to be delivered ie purchases it has to be done before 15/12/00. (Record of Appeal, page 46 lines 16-27).

I cannot remember when ExP15 was processed for payment.

A The accused attended to the delivery of the linoleum in ExP15 but I was in the school when it was delivered. (Record of Appeal, page 47 lines 10-12).

I have not checked the store records to see if the things stated in ID6 had been delivered to the school. Before I saw a copy of B ID6 in the LPO book I cannot remember any complaint from my staff about shortage of Duplo Ink and Duplo Master. (Record of Appeal, page 47 lines 24-27).

[17] From the above passages quoted from the grounds of C judgment of the learned trial judge, I am of the view that it cannot be said that the defence did not challenge exh. P15, however, the fact remains that the appellant did not challenge PW11's evidence that he had acknowledged receipt of the 14 rolls of floor mat ordered by PW11 from Morazi Enterprise and therefore, the D learned trial judge did not err in comparing the appellant's signature in exh. P7 and exh. 15.

[18] The learned counsel for the appellant submitted that since the respondent is relying on s. 73 of the Evidence Act then the same provision ditto applies as far as PW11's signature on LPO E No. 713280 (exh. P6) is concerned as what is good for the goose must be good for the gander. With due respect to the learned counsel for the appellant, his argument is flawed because the situation here is different. According to the evidence of PW11, the LPO are in 4 copies and she discovered that when she flipped F through the LPO Book, exh. P14 that none of her signature was on the green coloured LPO and she became suspicious because normally when she signed on the LPO there would be a carbon copy between the pages of the LPO and her signature would reach the green coloured copy of the LPO. In cross-examination, G when it was put to PW11 that "ID6 did not have your signature in the copy in the LPO Book not because you didn't sign but because the carbon paper did not reach the green last copy" and she answered, "I disagree". Although it was put to PW11 that "It is a very common practice for you to correct the LPO book when H the carbon paper was not correctly placed" and she replied, "Yes sometimes"; this answer does not detract from the fact that PW11 positively said that she did not sign on the LPO exh. P6 because she did not ask the appellant to order the 4 items stated in the LPO exh. P6. Looking at 5 the LPO exh. P6 found in LPO Book I exh. P14, it is patently clear that the green copy of the LPO exh. P6 is without the signature of PW11. Why is this so?

[19] In respect of Ground 3J (tenth ground), the appellant submitted that the learned trial judge has misdirected herself on the appellant's defence which was an unsworn statement from the dock. In considering the defence, the learned trial judge is mindful of the fact that a statement from dock carries less weight than one which is given under an oath. I find that she has given the defence its due weight in the light of her findings and conclusions derived therefrom at pp. 78 to 81 of the record of appeal. The learned counsel for the appellant submitted that the appellant did not cast aspersions on the character of PW11 in making out his statement from the dock. With regret, I find this is not true because as pointed by the learned trial judge, the defence attempted to lay the blame on PW11''s shoulder for the non delivery of the floor mat and to cast aspersions on her character by the allegation of improper practice of exchanging cash for goods ordered and using it to other things. This is illustrated for example in the evidence pertaining to the order of food for the hostel as follows:

> In the case of ordering of food for the hostel, the food was ordered and paid for eventhough the students had gone home for the weekend. In exchange, the supplier would pay cash with the consent of the Principal.
>
> All these transactions were done in secret by the Principal and the money from the transactions could not be used by individuals including myself because the records were kept by the Principal.
>
> All the transactions including the exchanging of goods with other things or with cash were done with the knowledge of the Principal and my other colleagues, including the typist and the lab assistant stationed at the general office. (Record of Appeal, page 62 lines 2-12).

[20] In respect of Ground 3K (11th ground), the appellant contended that there was irregularity in the trial in calling PW11 whereby PW11 was called once and recalled to tender in a confession which was subsequently withdrawn and thereby PW11 was allowed to give further evidence when she was recalled. This aspect of the evidence is covered in PW11's testimony at pp. 32-38 and pp. 40-52 (on recall) of the record of appeal. I agree with the submission of the learned DPP on the chronology of events regarding this point as follows:

PW11 testimony from page 32-38 was the examination in chief. At page 38 a letter was introduced (ID17). ID17 was a letter written by the appellant. The defence objected to the admissibility of ID17 (The Learned Trial Judge ruled that ID17 was not admissible). At this stage PW11 testimony was suspended. PW11 had yet to be cross examined by the defence. At page 40 AR, PW11 was recalled. The prosecution declined to adduce the so called written confession. PW11 was recalled solely to identify 2 senior assistants namely Encik Abang Othman and Enck Gat. After these two senior assistants were identified, PW11 was cross examined by the learned defence counsel Mr. Ong. PW11 was re-examined at page 52 AR. PW11 was re-examined on ID16 and P15. PW11 had (sic) earlier on was crossed-examined on ID16 and P15 at page 46 AR. The respondent submitted that there was no irregularity in the proceeding of the trial. Furthermore the prosecution re-examined PW11 on areas that was raised during cross-examination.

[21] For all the reasons above, I find that there are no merits in the grounds of appeal submitted by the appellant in support of his appeal against conviction and therefore I affirm the finding of guilt and conviction entered by the learned trial judge.

[22] The appellant is dissatisfied with the sentence on the grounds that the learned trial judge:

(i) misdirected herself on imposing punishment under s. 16 of the Act, when the appellant's copy of the charge referred to punishment under s. 19 of the Act;

(ii) erred in law in not adhering to the principles governing sentences; and

(iii) the sentence is out of proportion to the gravity of the offence and is manifestly excessive.

[23] The learned DPP submitted that the learned trial judge was right in imposing the punishment under s. 16 of the Act as that is the punishment section for an offence under s. 11 and she has urged the court to affirm the sentence.

[24] I have considered the cases and authorities cited by the learned DPP, namely *PP v. Mohd Salim Hamiddulraham* [1998] 4 CLJ 199 held [1] and [2]; *PP v. Jafa bin Daud* [1981] 1 MLJ 315 at p. 316 para B-E left; *Goh Leng Sai v. Reg* [1959] 25 MLJ 121 held (4); *Principles of Sentencing as Applied to Offences Relating to*

Bribery and Corruption [1976] MLJ xcvii by Low Hop Bing (now a High Court Judge) *vis-a-vis* the mitigation submitted by the appellant at pp. 64 and 65, the prosecuting officer's submission at p. 65 and the learned trial judge's view at p. 66 of the record of appeal. In passing the sentence, the learned trial judge stated that she had considered the mitigation and submission of the prosecuting officer and held the view that s. 294 of the CPC (binding over) is not an option exercisable by her. The appellant submitted that the prosecution has failed to prove that he had received any gratification or enjoyed any pecuniary benefit to justify the fine of RM25,000 and therefore, the sentence is wrong and ought to be set aside. Here, I would like to follow the decision of *PP v. Mohd Salim Hamiddulrahman (supra)* on the issue of the interpretation to be accorded to s. 16 of the Act, where the learned judge held "It was incumbent upon the trial court to interpret literally, by giving s. 16 of the ACA its ordinary, plain and natural meaning, which is that "any person convicted ... shall be liable to imprisonment ... and a fine." That, however, is not to say that the prescribed form of punishment under s. 16 of the ACA is mandatory. But if a court should act under s. 16 of the ACA, then it cannot deny the effect of s. 16 but must impose the prescribed imprisonment under s. 16(a) and the prescribed fine under s. 16(b) thereof."

[25] Considering all the aforesaid matters against the backdrop of the facts of the case, the circumstances under which the offence was committed and the grave nature of the offence of which public interest is of foremost consideration, I am not inclined to interfere with the sentence imposed by the learned trial judge and hence, I affirm the sentence of 1 (one) year imprisonment and the fine of RM25,000 in default 6 (six) months imprisonment.